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No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1959

FERNANDO A. SOBERAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 452

FERNANDO S. FORFARI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The two opinions of the United States District Court for the Northern District of California, Northern Division (R. 10, 13; Pet. App., pp. i, iv) are unreported. The opinion of the Court of Appeals (R. 128; Pet. App., p. vi) is reported at 268 F. 2d 29.

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1959. On August 24, 1959, Mr. Justice Black signed an order extending the time to file a petition for a writ of certiorari to and including October 6, 1959. The petition for a writ of certiorari

was filed on October 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a civilian employee of a federal instrumentality, which is operated as an integral part of the federal military service on non-appropriated funds rather than on congressionally-appropriated funds, may recover damages under the Federal Tort Claims Act for work injuries sustained by him in the course of his employment and for which he has received workmen's compensation benefits.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra,* pp. 11–15.

STATEMENT

Petitioner was employed as a chef by the Mare Island Cafeteria System, a non-appropriated fund federal agency, organized and operated under Navy regulations for the purpose of supplying food to personnel at the Mare Island Naval Shipyard (R. 15). The Cafeteria System provided food service to the Commissioned Officers' Club, another non-appropriated fund agency (R. 66–72).

On November 21, 1951, petitioner sustained personal injuries when he slipped and fell down a flight of stairs located in the Officers' Club in which he was performing his duties (R. 26–27, 48). By reason of the injuries incurred in this accident, petitioner received medical and hospital care paid for by the California State Fund Insurance Company in the amount of $4,085.76 (R. 16). This company was

the workmen's compensation insurance carrier for the Cafeteria System (petitioner's employing agency), and the amount of the compensation award was fixed by the Industrial Accident Commission of the State of California.

Petitioner brought this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b) (App., *infra*, p. 11), seeking to recover additional damages from the United States for his injuries. The District Court found that petitioner's injuries had been proximately caused by the negligence of the United States in failing to provide a hand-rail on the staircase, in permitting the protrusion of steel strips at the edge of each step, and in failing to light the staircase properly (R. 15). It held that petitioner was not precluded from maintaining this suit, and awarded him damages of $12,673.26.

The Court of Appeals reversed, holding that petitioner could not maintain an action under the Tort Claims Act. That court held that petitioner had been a federal employee at the time of his injury and that, in view of the workmen's compensation remedy afforded him, he was not entitled to an additional remedy under the Tort Claims Act (R. 123–136). The court also cited with approval *Aubrey* v. *United States*, 254 F. 2d 768 (C.A.D.C.), which had held that, even where an employee of a federal instrumentality cannot be characterized as a federal employee, his receipt of compensation benefits will constitute his exclusive remedy against the Government for injuries sustained in the course of his employment (R. 135–136).

ARGUMENT

The issue in this case has been stripped of all prospective importance by recent legislative action. In addition, the holding below is clearly correct and there is no conflict with any other court of appeals. Accordingly, there is no occasion for review here.

1. Statutory changes in the applicable law, in 1958, have rendered the question raised here of no prospective importance. In this legislation Congress has clarified the legal status of non-appropriated fund activities and has explicitly prescribed the remedies exclusively available to employees of these activities who incur injuries while peforming their employment duties.

Non-appropriated fund agencies, such as that which employed petitioner, are unincorporated entities which have been established by the regulations of a department of the United States Government for the purpose of conducting a variety of activities for the benefit of military personnel or civilian employees of the department. These agencies are permitted to employ the funds which their activities produce rather than covering them into the Treasury and then withdrawing them by appropriation. But no person has a proprietary interest in these funds and any profits do not accrue to individuals. The programs of these agencies are devoted exclusively to those services which contribute to departmental morale, job interest, cooperation, better attendance, health and productive output. See, *e.g.*, Navy Civilian Personnel Instruction 66, Section 2–2 (Pet. App., p. xxii). It is settled

that such non-appropriated fund activities are integral parts of the Government's military services. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

In June 1952, Congress enacted 66 Stat. 138, 5 U.S.C. (1952 ed.) 150k–1 (App., *infra*, p. 11), which required non-appropriated fund activities to provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment. Then, in 1958, Congress replaced this requirement with the present provision, making the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. (1952 ed.) 901–950, applicable to civilian employees of non-appropriated fund instrumentalities of the military department, 72 Stat. 397, 5 U.S.C. 150k–1 (App., *infra*, p. 12). The 1958 amendment expressly provides that the remedy under the Longshoremen's and Harbor Workers' Compensation Act granted these employees by this legislation "shall be exclusive and in the place of all other liability of the United States * * *."[1]

Thus, there can be no doubt that, under present law, employees such as petitioner are granted a compensation remedy under the Longshoremen's and Harbor Workers' Compensation Act and that, by virtue of the express exclusivity provision in the 1958 amendment of 5 U.S.C. 150k–1, no additional remedy may be sought against the United States under the

[1] The Longshoremen's and Harbor Workers' Compensation Act provides a compensation remedy and, in explicit terms, itself states that this remedy "shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee * * *." 44 Stat. 1426, 33 U.S.C. (1952 ed.) 905 (App. 15).

Tort Claims Act.[2] The question raised by the petition can have no future or continuing importance.

2. As the court below held, petitioner was a federal employee and, as such, cannot maintain a suit under the Tort Claims Act for damages incurred in the course of performing his employment.

In *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485, this Court held that Army post-exchanges (which are nonappropriated fund instrumentalities) were "arms of the Government" and "integral parts of the War Department." This principle, that a non-appropriated fund activity is a federal instrumentality, has been held applicable in all of the cases which have involved such agencies, including one which concerned the naval food services involved in the case at bar. *Nimro* v. *Davis,* 204 F. 2d 734 (C.A.D.C.), certiorari denied, 346 U.S. 901. The logical corollary to these holdings is, of course, that an employee of one of these instrumentalities is a federal employee.

Following the decision in *Standard Oil* v. *Johnson, supra,* the Civil Service Commission concluded that the employees of these activities were subject to the laws and regulations administered by the Commission. The Department of Defense subsequently pointed to the administrative problems which would confront the military departments if these employees were not exempted from civil-service rules and regulations. See H.R. Rept. No. 1995, 82d Cong., 2d Sess., pp. 3–4. Because of these problems, Congress passed the Act of June 19, 1952, 66 Stat. 138, 5 U.S.C. (1952 ed.)

[2] This 1958 amendment does not apply to petitioner's 1951 injuries because it operates prospectively only.

150k (App., *infra*, p. 11), which provided that employees such as petitioner "shall not be held and considered as employees of the United States *for the purpose* of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act * * *"[3] (emphasis added). This statute emphasized the fact that since employees of nonappropriated fund instrumentalities were federal employees special legislation was needed to remove them from the coverage of the civil service laws and the Federal Employees Compensation Act. In the 1952 and 1958 Acts, the status of these activities as federal instrumentalities is expressly left unaffected. Thus, both the decided cases and the recent Congressional action leave no room for doubt that employees like petitioner have always been considered federal employees.

It is equally well established that employees of the United States, civilian as well as military, cannot maintain suits under the Tort Claims Act for damages incurred in the course of performing their duties. *Johansen* v. *United States*, 343 U.S. 427; *Feres* v. *United States*, 340 U.S. 135; *Lewis* v. *United States*, 190 F. 2d 22 (C.A.D.C.), certiorari denied, 342 U.S. 869. In *Johansen*, the Court held that, since the injuries of a civilian seaman were covered by the Federal Employees Compensation Act, suit would not

[3] The exemption of these employees from the Federal Employees Compensation Act and the insurance requirement in the 1952 statute represented a decision by Congress to place the financial burden of compensation insurance for such employees on the non-appropriated funds themselves, rather than upon the general public funds.

lie against the Government under the Public Vessels Act even though the Compensation Act did not at that time expressly provide that its benefits constituted the injured employee's exclusive remedy. The reasoning of the Court was not based on the exclusive character of the Compensation Act, as petitioner claims, but on the theory, fully applicable here, that one remedy must be fitted (343 U.S. 427, 432) "into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." Similarly, in the *Feres* case, this Court, holding that a member of the armed forces could not maintain a suit under the Tort Claims Act for injuries sustained while in the performance of his duty, noted that Congress had provided a system (340 U.S. 135, 144) "of simple, certain and uniform compensation for injuries or death * * *."

Petitioner insists that the fact that Congress has consistently chosen to place the employees of non-appropriated fund agencies under private compensation acts indicates a Congressional purpose that they not be considered "federal employees" for injuries incurred in their employment and that they therefore be permitted to sue the United States as a third party tort-feasor. But petitioner does not suggest, as he cannot, why Congress should have wanted to give employees of non-appropriated fund activities greater rights against the Government than those possessed by other categories of federal employees. It is obviously because these agencies are permitted to use their own funds that Congress has decided to let them insure their own employees directly, rather than

through the broad general scheme for federal employees. This policy decision by Congress cannot, we submit, be construed as the grant of a right of suit under the Tort Claims Act to a particular category of federal employees, which, as this Court has held, is not available to federal employees in general. See also the *Aubrey* case, *supra*, p. 3.

In 1951, when petitioner was injured, it was the practice of the non-appropriated fund activities to provide the workmen's compensation that the 1952 Act later made mandatory. The Mare Island Cafeteria system did provide petitioner with such benefits and it is conceded that the California State Fund Insurance Company awarded him $4,085.76 for the injuries sustained by reason of his fall. Having received these compensation benefits from the Government, through its own instrumentality, petitioner, a federal employee, cannot, as the court below properly held, maintain this damage suit against the Government.

3. Petitioner urges, as a ground for certiorari, a "conflict among the circuits." Pet. 8. He then concedes that the two courts of appeals which have passed on the question are both against his position, and that only two earlier district court decisions have held an opposite view (*ibid.*). There is, accordingly, no such conflict between courts of appeals as would warrant review by this Court. Cf. Rule 19 of the Revised Rules of this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1959.

APPENDIX

1. 28 U.S.C. 1346 (Federal Tort Claims Act) provides in pertinent part:

* * * * *

> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

2. The Act of June 19, 1952, 66 Stat. 138, 139, 5 U.S.C. (1952 ed.) 150k, 150k–1, provides (as it appears in the United States Code):

> § 150k. *Civilian employees not subject to laws administered by Civil Service Commission.*
>
> Civilian employees, compensated from nonappropriated funds, of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil

Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: *Provided*, That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected.

The nonappropriated fund instrumentalities described in section 150k of this title shall provide their civilian employees, by insurance or otherwise, with compensation for death or disability incurred in the course of employment. In the case of employees employed in the continental United States (except Alaska), compensation shall be not less than that provided by the laws of the State (or the District of Columbia) in which the employing activity of any such instrumentality is located. In the case of employees employed outside the continental limits of the United States and in Alaska, compensation shall be not less than that provided in sections 907–909 of Title 33, except that in the case of such employees who are not citizens of the United States, compensation shall be in accordance with regulations to be prescribed by the Secretary of the Army, Navy, Air Force, or Treasury, as the case may be. This section shall take effect sixty days after June 19, 1952.

3. The Act of July 18, 1958, 72 Stat. 397, 5 U.S.C. 150k–1 provides (as it appears in the United States Code):

§ 150k–1. *Same; death or disability compensation; definitions; compensation districts; judicial proceedings; regulations; exclusiveness of remedy.*

(a) The Longshoremen's and Harbor Workers' Compensation Act shall apply with respect to the disability or death resulting from injury, as defined in section 902(2) of Title 33, of such Act, occurring to a civilian employee of any nonappropriated fund instrumentality de-

scribed in section 150k of this title, subject to the following provisions of this section:

(1) For the purposes of section 150k of this title and this section, the term "employee" in section 902(3) of Title 33 shall include only—

(A) those employees of such nonappropriated fund instrumentalities as are employed within the continental United States and

(B) those United States citizens or permanent residents of the United States or a Territory who are employees of such nonappropriated fund instrumentalities outside the continental limits of the United States.

(2) For the purposes of section 150k of this title and this section, the term "employer" in section 902(4) of Title 33 shall include each of the nonappropriated fund instrumentalities described in section 150k of this title.

(3) For the purposes of section 150k of this title and this section, only that part of section 903(a) of Title 33 which precedes the first comma shall apply.

(4) The Secretary of Labor is authorized—

(A) to extend compensation districts established under section 939(b) of Title 33 or to establish new districts to include the areas outside the continental limits of the United States and

(B) to assign to each such district one or more deputy commissioners as the Secretary deems advisable.

Judicial proceedings under sections 918 and 921 of Title 33 with respect to any injury or death occurring outside the continental limits of the United States shall be instituted in the district court within the

territorial jurisdiction of which is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such district.)

(b) In case of disability or death resulting from injury, as defined in section 902(2) of Title 33, of an employee who is not a citizen or permanent resident of the United States or a Territory, employed outside the continental limits of the United States by any nonappropriated fund instrumentality described in section 150k of this title, compensation shall be provided in accordance with regulations prescribed by the Secretary of the military department concerned and approved by the Secretary of Defense or regulations prescribed by the Secretary of the Treasury, as the case may be.

(c) The liability of the United States or of any nonappropriated fund instrumentality described in section 150k of this title, with respect to the disability or death resulting from injury, as defined in section 902(2) of Title 33, of any employee referred to in subsection (a) or (b) of this section, shall be determined as provided in section 150k of this title and this section. Such liability shall be exclusive and in the place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any person otherwise entitled to recover damages from the United States or such nonappropriated fund instrumentality on account of such disability or death in any direct judicial proceedings, in a civil action, or in admiralty, or by proceedings whether administrative or judicial, under any workmen's compensation law or under any Federal tort liability statute.

4. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U.S.C. (1952 ed.) 905, provides (as it appears in the United States Code):

> § 905. *Exclusiveness of liability.*
>
> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

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